1986

David R. Williams dba Industrial Communications v. Public Service Commission of Utah; Brent H. Cameron, Chairman; James M. Byrne, Commissioner; Brian T. Stewart, Commissioner, and American Paging, Inc. : Brief of Petitioner

Utah Supreme Court

860313

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID R. WILLIAMS d/b/a INDUSTRIAL COMMUNICATIONS,

Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF UTAH; BRENT H. CAMERON, Chairman; JAMES M. BYRNE, Commissioner; BRIAN T. STEWART, Commissioner, and AMERICAN PAGING, INC.,

Respondents.

Case Nos. 860313
860314

#9

BRIEF OF PETITIONER

ON WRIT OF CERTIORARI FROM THE SUPREME COURT OF UTAH TO THE UTAH PUBLIC SERVICE COMMISSION

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LIST OF ALL PARTIES

In addition to the parties listed in the caption, Mobile Telephone, Inc. was a protestant below in the Matter of the Application of American Paging, Inc. for a Certificate of Convenience and Necessity, Case No. 85-2007-01. Mobile Telephone, Inc. is represented by Kay M. Lewis, 320 South 300 East, Suite 1, Salt Lake City, Utah 84111.

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STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Whether the Public Service Commission failed to comply with the Utah Administrative Rulemaking Act, Utah Code Ann. § 63-46a-1, et seq., thereby invalidating Commission Rule No. 8304 which purports to eliminate the Commission's jurisdiction over one-way paging services.

II. Whether the Public Service Commission erred in dismissing American Paging's Application for Certificate of Convenience and Necessity to operate a one-way telephone paging service on the basis that the Commission no longer has jurisdiction to regulate paging services.

III. Whether the Public Utilities Act, Utah Code Ann. §§ 54-8b-1, et seq. (Supp. 1985), impacts the Public Service Commission's jurisdiction over one-way paging services.

STATEMENT OF FACTS

Since 1962, the Utah Public Service Commission ("Commission") has interpreted its regulatory authority over telephone corporations and the services provided by them to include one-way paging services. In fact, in a predecessor case to this action, this Court recently stated:

> Understanding the history of the Commission's assertion of regulatory authority over one-way paging services is important to this case. In 1962, the Commission granted a Certificate of Public Convenience

> and Necessity to operate both a two-way mobile telephone system and a one-way paging service to petitioner Mobile Telephone, Inc. By this action, and without objection from any party, the Commission assumed jurisdiction over both one-way paging and two-way mobile telephone services under Sections 54-2-1(21), (22), and (30) of the Code. (Footnote omitted.) Between 1962 and 1983 the Commission granted similar duel authority certificates to three other companies. In 1974, the Commission granted to Mobile Telephone of Southern Utah, Inc., a single authority certificate covering only one-way paging service. From the record, it appears that the Commission has, on occasion, denied requests for certificates for one-way paging authority. Until 1983, however, the Commission's authority to regulate one-way paging services was not questioned.

Williams v. Public Service Commission, 720 P.2d 773, 774 (Utah 1986).

The case referred to above is of interest not only because of the light it sheds on the Commission's twenty-year history of regulating one-way paging services, but also because it plays an important procedural role in the history of the case now before the Court.[1] The decision in Williams was the result of an appeal filed by David Williams, petitioner herein, and

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1 The opinion prepared by Justice Zimmerman and filed on March 4, 1986 in Williams v. Public Service Commission, 720 P.2d 773, (Utah 1986) provides a thorough statement of the facts pertinent to the initial appeal as well as to the present proceeding. Petitioner will not restate those facts but simply directs the Court's attention to its previous recital of the facts. A copy of the Court's opinion is contained in Appendix A.

other certificated providers of one-way paging service in response to action by the Commission which this Court determined was an improper attempt to deregulate one-way paging. In Williams, it was held that the Commission's attempts to deregulate one-way paging services constituted rulemaking and as such were subject to the provisions of the Utah Administrative Rulemaking Act. The Commission's failure to comply with the notice and hearing requirements of the Administrative Rulemaking Act required that this Court vacate the Commission's orders which, if allowed to stand, would have eliminated the Commission's jurisdiction over one-way paging services, "effectively deregulating that field." Williams v. Public Service Commission, 720 P.2d at 775.

Within weeks of the Court's opinion in Williams, the Commission filed a notice of proposed rulemaking with the Office of Administrative Rules, which purported to retroactively eliminate the Commission's jurisdiction over one-way paging. The body of the notice simply stated:

> The Public Service Commission of Utah does not have jurisdiction over one-way paging service. The reason for the rule is that one-way paging service does not fall within the definition of a "telephone corporation" in that such service does not utilize a "telephone line."

This notice demonstrates a fundamental mis-reading of this Court's opinion in Williams and seeks to declare retroactively "no jurisdiction" rather than prospectively to deregulate a long regulated industry. (A copy of the Notice of Proposed Rulemaking is contained in Appendix B.) Williams timely filed his objections to the Proposed Rule and requested a public hearing. (R. at 22) The proposed rule was adopted without adequate notice to all interested persons and without a hearing and made effective as Rule No. 8304 on May 16, 1986. (R. at 248)

On April 30, 1985, after having provided paging service to the general public for nearly two years without authority, American Paging filed an application with the Commission for a Certificate of Convenience and Necessity to operate a public utility rendering paging services in designated areas in Utah. American Paging simultaneously filed a Motion to Dismiss its application on the ground that the Commission did not have jurisdiction over one-way paging. (R. at 248). In an order issued May 23, 1986, the Commission granted American Paging's Motion to Dismiss its application for lack of jurisdiction. (R. at 249) (See Appendix C).

By this appeal, petitioner David Williams seeks review of the Commission's adoption of Rule No. 8304 and its dismissal of American Paging's application for lack of jurisdiction.

SUMMARY OF THE ARGUMENT

The Commission's first attempt to deregulate one-way paging services was vacated in Williams v. Public Service Commission, supra, for failure to comply with the requirements of the Utah Administrative Rulemaking Act.[2] Its action in purporting to adopt Rule No. 8304 is likewise invalid for, among other things, failure to even attempt to "deregulate" a regulated industry and in failing to give adequate notice and an opportunity for a hearing.

The Commission clearly misinterpreted this Court's opinion in Williams since it did not even attempt to deregulate paging services. It simply declared, retroactively, that it "does not have jurisdiction over one-way paging services." The Commission's action is void on its face as a matter of law.

The Commission's attempt to give notice of the proposed rule change was inadequate since the only notice given to Williams came in a collateral proceeding. Moreover, it does not appear from the record that notice was given to other interested parties and to the very same non-parties to whom no notice was given in the prior proceeding which this Court found to be fatally defective in Williams. Additionally, the notice was

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2 The Court in Williams did not reach the substantive issues which petitioner Williams maintains would have also prevented the Commission from denying its jurisdiction over one-way paging services.

ineffective and void because it failed to set forth the reasons and justifications for changing the longstanding rule previously adhered to by the Commission and acknowledged by the Court in Williams. Utah law provides that radical departures from administrative interpretation consistently followed cannot be made except for the most cogent reasons. Adoption of Rule No. 8304 represents a radical departure from the Commission's twenty year old exercise of jurisdiction over one-way paging services, and since no cogent reasons compelling a departure from the Commission's longstanding practice were given, the rule should be vacated ab initio.

Furthermore, the Commission is estopped from reversing its long-standing practice of regulating one-way paging services. The Commission originally assumed jurisdiction over one-way paging services by issuing certificates of necessity and public convenience to Williams and others. It then vigorously regulated these certificate holders and tightly controlled entry for many years. Williams relied on these certificates by expending in excess of a million dollars to develop a full service, sophisticated paging service which he would not have done but for the certificates he received. As a result of Rule No. 8304, Williams has suffered and will continue to suffer injury as a direct result of his reliance in good faith on the Commission's twenty plus year history of regulating paging services.

The certificates of public convenience and necessity formerly issued by the Commission to Williams constitute valuable property rights. Because Rule No. 8304 effectively voids those certificates, it follows that Williams has been deprived of his property rights without compensation as required by substative principles of due process.

ARGUMENT

I.

COMMISSION RULE NO. 8304 IS INVALID BECAUSE THE COMMISSION FAILED TO COMPLY WITH JUDICIAL AND LEGISLATIVE REQUIREMENTS FOR DEREGULATION

A. The Commission's Attempt to Escape Regulation of One-Way Paging is not in Accordance with the Utah Supreme Court's Opinion in the Williams Case.

In Williams v. Public Service Commission, 720 P.2d 773 (Utah 1986), a case involving virtually the same dispute between the same parties as this case, this Court concluded that "the Commission cannot reverse its long-settled position regarding the scope of its jurisdiction and announce a fundamental policy change without following the requirements of the Utah Administrative Rulemaking Act." Id. at 777. The legal and practical effect of the Commission's order in Williams was to deregulate a regulated industry by administrative fiat. The Court noted:

> Following the November hearing, the Commission formally ruled that it had no jurisdiction to regulate one-way paging services, effectively deregulating that field.

720 P.2d at 775 (Emphasis added). The Court continued:

> [B]y deregulating the one-way paging market and permitting open competition in the market, the decision altered the rights of all certificate holders, despite their explicit reliance on the Commission's prior interpretation.

Id. at 776.

Instead of complying with the Court's mandate in Williams by seeking to "deregulate" this long regulated industry in the future, the Commission summarily sought to wash its hands of this subject by simply declaring retroactively that the Commission "does not have jurisdiction over one-way paging." (R. at 29). Petitioner submits that this recent action by the Commission flies directly into the face of this Court's admonition to the Commission in Williams, is void on its face, and should be vacated.

B. The Commission Again Failed to Comply with the Statutory Notice Requirements.

One of the requirements of the Administrative Rulemaking Act, Utah Code Ann. § 63-46a-4 (1953) is that proper notice be given to all interested parties:

> (4) A copy of the rule analysis form shall be mailed to all persons who have made timely

> request of the agency for advance notice of its rulemaking proceedings, and to any other person who, by statutory or federal mandate, or in the judgment of the agency, should also receive notice. (Emphasis added).

The only notice provided to Williams came as a result of Chairman Cameron handing counsel for Williams a copy of Notice of Proposed Rule Change during a scheduling conference in a collateral proceeding. (R. at 24, 25). While the Commission purports to have provided notice to "the parties" (R. at 236), the record is silent as to the identities of those parties and to the manner in which notice, if any, was provided. Besides Williams, all other affected persons should have been given notice. At the very least, that should include all holders of certificates for one-way paging service. A primary reason the Commission's Order in Williams was vacated was because adequate advance notice was not given to all affected parties, including non-parties. Williams v. Public Service Commission, 720 P.2d at 777. Similarly, Commission Rule No. 8304 should be vacated.

Even though a "notice" was provided to Williams, it was wholly inadequate in terms of what must be set forth in a Rule Analysis Form. Utah Code Ann. § 63-46a-4(3) (1953) states:

> (3) The rule analysis form shall contain:
> (a) A summary of the rule or change;
> (b) the purpose of the rule or reason for the change;
> (c) the statutory authority or federal requirement for the rule;

(d) the anticipated cost or savings to the state budget and compliance costs for affected persons;
(e) how interested persons may inspect the full text of the rule;
(f) how interested persons may present their views on the rule;
(g) the time and place of any scheduled public hearing;
(h) the name and telephone number of an agency employee who may be contacted about the rule; and
(i) the signature of the agency head or designee.

The notice received by counsel for Williams contained little more than a statement indicating that the Commission did not have jurisdiction to regulate one-way paging services. To constitute a valid notice, the notice must contain the items prescribed in the statute. The Commission failed to give such a notice to Williams and other interested parties. It follows that its purported action is void and should be vacated.

II.

THE PUBLIC SERVICE COMMISSION ERRONEOUSLY CONCLUDED THAT, DESPITE A LONG HISTORY OF REGULATING ONE-WAY PAGING SERVICES, IT COULD DECLARE BY ADMINISTRATIVE FIAT A CHANGE IN THE LAW SO AS TO ELIMINATE ITS CONTINUING JURISDICTION OVER SUCH COMPANIES

A. No Cogent Reasons Support Reversing the Commission's Long-Standing Regulation of One-Way Paging.

In Williams, the Court was not required to reach the substantive question of under what circumstances, if any, the

Commission could, after complying with all procedural requirements, change existing substantive rules upon which the public had come to rely without revisiting the legislature to obtain authority to do so. That issue was addressed, however, in Husky Oil Co. v. State Tax Commission, 556 P.2d 1268 (Utah 1976). The Utah State Tax Commission had promulgated a regulation in 1937 which exempted certain business transactions from sales tax. In 1971, after having complied with all applicable procedural requirements, the Utah Tax Commission by regulation reversed its long-standing position and eliminated the exemption. This Court reversed the Utah Tax Commission and set aside the de-exemption regulation, stating:

> Also, the Commission's S-38 Regulation which interpreted the statute in question for 34 years to allow for an exemption of a sale such as the one in this case adds strength to retention of that exemption. The Commission's conclusion in the brief on appeal 'that administrative agencies . . . are free to depart from prior determinations' is not persuasive in this case. Said brief cites an opinion from this Court to buttress its conclusion, which on its facts is not controlling here. Justice Ellett does cite in that opinion, 73 C.J.S. Public Administrative Bodies and Procedure Section 148, in which it is stated that . . . administrative bodies are not ordinarily bound by their prior determinations . . . . But said Section 148 continues as follows:
>
> > <u>However, prior determinations are entitled to great weight . . . and radical departures from administrative interpretation consistently followed</u>

> cannot be made except for most cogent reasons.
>
> The Commission has made radical departures from an interpretation unchangingly followed by it for more that three decades. And, in addition to matters already discussed, the inclusion of language in the current S-38(C) regulation, supra, does not infuse cogency into the reasons for those departures.

556 P.2d at 1271 (Emphasis added).

The Commission has consistently and continually exercised jurisdiction over one-way paging services for more than two decades. The only reason profferred by the Commission for its drastic change in course is its assertion that "one-way paging service does not fall within the definition of a "telephone corporation" in that one-way paging does not utilize a "telephone line". In view of twenty years of contrary interpretation of the statute, and the reliance placed on that interpretation by all certificate holders, this reason does not rise to the level of "cogency" called for in Husky Oil. The Commission failed to indicate any substantive policy considerations which called for deregulation or exemption, nor did it point to any circumstances which, in the public interest, would require the same.

B. The Commission is Estopped From Reversing Its Long-Standing Practice of Regulating Paging Services.

The principle of equitable estoppel "may be applied against the State, even when acting in a governmental capacity, if necessary to prevent manifest injustice, and the exercise of governmental powers will not be impaired as a result . . . ." Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689, 694 (Utah 1979).

In Celebrity Club, Inc., appellant sought to establish a club licensed to serve alcohol. A statute prohibited the granting of a liquor license to any facility located within a 600-foot radius of a public or private school. Upon inquiry, appellant was advised by the Utah Liquor Control Commission that it would not be in violation of the statute by reason of the club's location. In reliance of the Liquor Control Commission's representation, appellant expended a substantial sum of money to complete its club. The Liquor Control Commission thereafter denied the appellant's request for a liquor license on the ground that a different interpretation of the statute placed its club within 600 feet of a school.

On appeal, this Court found the Liquor Control Commission to be equitably estopped from denying the application, stating:

> The elements essential to invoke the doctrine of equitable estoppel are:

(1) An admission, statement, or act inconsistent with the claim afterwards asserted,

(2) action by the other party on the faith of such admission, statement, or act, and

(3) injury to such other party on the faith of such admission, statement or act.

602 P.2d at 694

The application of this three-part test to the instant action shows that the Commission is estopped from denying its authority to regulate one-way paging services. The Commission granted certificates of public convenience and necessity for the offering of paging services to Williams, who in reliance thereon has expended in excess of one million dollars to develop a full service, sophisticated paging service which he would not have done but for the certificates he received.[3] In a hearing held before the Commission on November 7, 1983, the following dialogue took place:

> Q. (By Mr. Burbidge) Would you have undertaken to establish this vast network of transmission facilities had you not received a certificate of convenience and necessity from the Commission to operate as a public utility in the paging business?
>
> . . .

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3 Record of Case No. 19867 at 842-43. While this is not in the Record of this action, we request this Court to take judicial notice of the Record in the Williams case since all parties present in this suit were present in the former action.

A. (By Mr. Williams) I absolutely would not have invested.

(R. of Case No. 19867 at 185-86). Williams has been required to comply with the rules and regulations promulgated by the Commission for regulated utilities. (R. of Case No. 19867 at 400). Williams has been required to file and act in accordance with published tariffs, subject to approval and enforcement by the Commission. (R. of Case No. at 400). Petitioner Williams also has been required to pay sales tax upon its services premised solely upon its status as a public utility. Williams v. Public Service Commission, 720 P.2d at 776. Williams extended service to geographic areas which are less profitable in order to provide full service to the general public, a service which it would not have otherwise provided. (R. of Case No. 19867 at 844-45). As a result of the rule change by the Commission, Williams has suffered, and will continue to suffer injury as a direct result of his reliance in good faith on the Commission's 20 year history of regulating paging services. In Celebrity Club, this Court stated:

> The doctrine of equitable estoppel is properly applicable in a case such as this, otherwise the whim of an administrative body could bankrupt an applicant who acted in good faith in reliance upon a solemn written commitment.
>
> * * *
>
> The conduct of government should always be scrupulously just in dealing with its

> citizens; and where a public official, acting within his authority and with knowledge of the pertinent facts, has made a commitment and the party to whom it was made has acted to his detriment in reliance on that commitment, the official should not be permitted to revoke that commitment. State v. Sponburgh, 66 Wash. 2d 135, 401 P.2d 635, 640 (1965).

602 P.2d at 689. It follows that the Commission is estopped from taking its purported action as a matter of law.

III.

THE COMMISSION'S ATTEMPT TO DEREGULATE PAGING SERVICES BY ADOPTING RULE NO. 8304 DOES NOT SATISFY THE STATUTORY REQUIREMENTS FOR EXEMPTING SUCH SERVICE FROM REGULATION.

A. Sections 54-8b-2 and 54-8b-3 of Utah Code Ann. Clarify the Public Service Commission's Authority To Regulate Public Telecommunication Services and Provide a Specific Procedure for Exempting Services From Regulation.

Utah Code Ann. §§ 54-8b-1, et seq. (Supp. 1985), was enacted by the Utah Legislature to clarify the Commission's authority to regulate public telecommunication services, and to provide a specific procedure for exempting certain services from regulation. Prior to enactment of Chapter 8b, the Commission had interpreted its jurisdiction over the telecommunications industry, as defined by Utah Code Ann. §§ 54-2-1(21), (22) and (30), to include paging services. This Court so held in Williams v. Public Service Commission, supra.

Despite active lobbying to obtain an exemption for paging services by American Paging throughout the legislative session in which Chapter 8b was enacted, coupled with the long and vigorous regulation by the Commission of paging services, the legislature declined to exempt paging services from application of the statue. Instead, the legislature adopted broad definitional language which clarifies and solidifies early interpretations of the Commission including paging services within the scope of the regulatory scheme. Section 54-8b-2, subparagraph (3) states:

> "Public telecommunications services" means the transmission of signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio lightwaves, or other electromagnetic means offered to the public generally.

Therefore, the legislature has now made clear that the Commission has jurisdiction over one-way paging services. The legislature also for the first time empowered the Commission to exempt regulated telecommunication services. However, that power was not unfettered. The Legislature imposed specific procedural and substantive requirements which must be complied with before the Commission may <u>exempt</u> any such service from regulation. These requirements are set forth in Section 54-8b-3, subparagraphs (1) and (2):

> (1) The Commission is vested with power and jurisdiction to partially or wholly exempt from

any requirement of this title, any telecommunications, corporation or public telecommunication service in this state.

(2) The Commission, on its own initiative or in response to an application by a telecommunications corporation or a user of a public telecommunications service, may, after public notice and an opportunity for hearing, make findings and issue an order specifying its requirements, terms and conditions, exempting any telecommunication service from any requirement of this title either for a specific geographic area or in the entire state if the Commission finds that the telecommunications corporation or service is subject to effective competition, that the customers of the telecommunications corporation or service have reasonably available alternatives, and that the the telecommunications corporation or service does not serve a captive customer base, and if such exemption is in the public interest. In determining whether to exempt any telecommunication service from any requirement of this title, the Commission shall consider all relevant factors including, but not limited to: (a) the number of other providers offering similar services; (b) the intrastate market power and market share within the State of Utah of the telecommunications corporation requesting exemption; (c) the intrastate market power and market share of other providers; (d) the existence of other providers to make functionally equivalent services readily available at competitive rates, terms and conditions; (e) the effect of exemption of the regulated revenue requirements of the telecommunications corporation requesting an exemption; (f) the ease of entry of other providers into the market place; (g) the overall impact of exemption on the public interest; (h) the integrity of all service providers in their proposed market; (i) the cost of providing such service; (j) the economic impact on existing telecommunications corporations; and (k) whether competition will promote the provision of adequate service at just and reasonable rates.

(Emphasis added).

Thus, in enacting Chapter 8b, the legislature has, for the first time, granted statutory authority to the Commission to deregulate by exemption.[4] At the same time, the statute requires that the Commission meticulously follow both procedural and substantive requirements in order for the exemption to be valid. The Commission has failed both to provide adequate notice and opportunity for hearing to interested parties, and to show that it considered all of the factors identified by the statute in arriving at its decision. Indeed, it considered none of them. No order has been issued indicating the Commission's findings, nor the requirements, terms and conditions for exemption. Absent compliance with these statutory requirements, the Commission's attempt to declare itself unable to regulate one-way paging services is invalid.

B. Section 54-8b-9 does not Affect the Applicability of Other Sections of Chapter 8b to One-way Paging Services.

In ruling on American Paging's Motion to Dismiss for lack of jurisdiction, the Commission concluded that Chapter 8b of the Public Utilities Act does not expand the jurisdiction of the Commission to include one-way paging. (R. at 236). This conclusion was apparently based on a premise that the Commission did

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4 Due to the enactment of Utah Code Ann. §§ 54-8b-1 et seq. (Supp. 1985), the applicability of the Administrative Rulemaking Act to this situation is in serious question. Indeed, there is no question that the amendment was in effect at the time of the Commission's actions and should have controlled.

not already have jurisdiction (a premise flatly rejected in Williams) and on Section 54-8b-9 which provides: "Nothing in this chapter shall be construed to enlarge or reduce the Commission's jurisdiction over the services and entities for which jurisdiction is provided or excluded by other provisions of this title."

The Commission's argument is misplaced for the following reasons:

1. The Commission's interpretation of Section 54-8b-9 robs Section 54-8b-2 of any meaning whatsoever. At very minimum, Section 54-8b-2 must be read as a clarification of prior definitions. Furthermore, the other provisions of the title had been long construed by the Commission to embrace and require regulation of paging services.

2. Any possible ambiguity is laid to rest by the legislative history created by the acts of American Paging. Knowing that paging service was specifically included within the definitions contained in the new chapter, American Paging actively lobbied throughout the legislative session in which this statute was enacted by the legislature to obtain a specific statutory exemption applicable to paging services. These American Paging efforts were made with the knowledge of and in the presence of Chairman Cameron. The legislature resolutely

rejected these attempts to read out of the statutory definition, by specific exemption, one-way paging services. (R. at 230,231)

3. Even assuming arguendo that Section 54-8b-9 prevented the 54-8b-2 definitions from meaning anything, it would not avail the Commission in this case because this Court ruled in the Williams case that paging services has been a regulated service in the State of Utah under the provisions of the statues as they existed prior to the 1985 amendments.

Therefore, for the above stated reasons, Section 54-8b-9 does not prevent the application of Chapter 8b to one-way paging services.

IV.

THE COMMISSION'S RULE DEPRIVES PETITIONER AND OTHER CERTIFICATE HOLDERS OF THEIR PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE RIGHT TO DUE PROCESS OF LAW.

A utility's certificate of public convenience and necessity constitutes a valuable property right. Schlagel v. Hoelsken, 162 Colo. 142, 425 P.2d at 39, 42, cert. denied Hoelsken v. Public Utilities Commission, 389 U.S. 827 (1967); See also City of St. George v. Public Service Commission, 565 P.2d 72 (Utah 1977). Likewise, the certificates of public convenience and necessity issued by the Commission to Williams are valuable property rights -- unless, of course Rule No. 8304 is allowed to stand in which case the certificates will be rendered worthless.

The Commission's Rule No. 8304 exempting one-way paging services from regulation effectively voids the certificates held by Williams thereby depriving him of his property rights without just compensation as required by substantive principles of due process. U.S. Const. Amend. 5; U.S. Const. Amend. 14; Utah Const. Art 1, § 7.

CONCLUSION

For the reasons set forth above, the Commission's Rule No. 8304 should be vacated. Similarly, the Commission's Order issued in Case No. 85-2007-01 should be reversed.

RESPECTFULLY SUBMITTED this ____ day of September, 1986.

KEITH E. TAYLOR
MICHAEL L. LARSEN
of and for
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Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing Brief of Petitioner, to the following on this 5th day of Sept, 1986:

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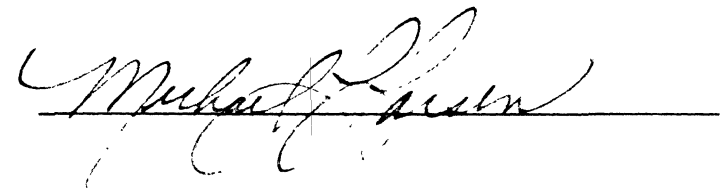

APPENDIX A

David R. WILLIAMS, dba Industrial Communications, Petitioner,

v.

The PUBLIC SERVICE COMMISSION OF UTAH, Brent H. Cameron, Chairman; David R. Irvine, Commissioner; James M. Byrne, Commissioner, Respondents.

MOBILE TELEPHONE, INC., a corporation, Petitioner,

v.

The PUBLIC SERVICE COMMISSION OF UTAH, Brent H. Cameron, Chairman, David R. Irvine, Commissioner, James M. Byrne, Commissioner, Respondents.

Nos. 19867, 19873.

Supreme Court of Utah.

March 4, 1986.

Appeal was taken from order of the Public Service Commission holding that Commission had no authority to regulate one-way mobile telephone paging services. The Supreme Court, Zimmerman, J., held that Public Service Commission's decision that no certificate of public convenience and necessity was necessary to operate one-way mobile telephone paging service, announced in letter to prospective operator, was a "rule" within meaning of Administrative Rule Making Act so that Commission was required to follow Act's procedural requirements.

Vacated and remanded.

1. Telecommunications ⇐461

Public Service Commission's decision that no certificate of public convenience and necessity was necessary to operate one-way mobile telephone paging service, announced in letter to prospective operator, was a "rule" within meaning of Administrative Rule Making Act [U.C.A.1953, 63-46-3(4) (Repealed)], so that Commission was required to follow Act's procedural requirements. U.C.A.1953, 54-1-1 et seq 54-1-1.6, 54-7-1.5, 54-7-13, 63-46a-1 et seq., 63-46a-2(8), 63-46a-3(3)(a), 63-46a-4; U.C.A.1953, 63-46-1, 63-46-3(4), 63-46-5 (Repealed); Const. Art. 1, § 7, U.S.C.A. Const.Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

2. Telecommunications ⇐461

Commissioners on Public Service Commission who had participated in decision that no certificate of public convenience was required to operate one-way mobile telephone paging service, announced in letter to prospective operator, would not be precluded from considering the jurisdictional matter on remand on basis that they had violated statutory prohibitions against ex parte communications, where prospective operator was not party to any proceeding pending before Commission at time letter was issued. U.C.A.1953, 54-7-1.5.

Keith E. Taylor, F. Robert Reeder, Michael L. Larsen, Brinton R. Burbidge, Salt Lake City, for petitioner.

David L. Stott, Stuart L. Poelman, Salt Lake City, for intervenor Amer. Paging.

Stephen R. Randle, Salt Lake City, for Page Amer.

David L. Wilkinson, Atty. Gen., Craig Rich, Asst. Atty. Gen., Salt Lake City, for respondents.

ZIMMERMAN, Justice:

Petitioners Industrial Communications and Mobile Telephone, Inc., appeal from an order of the Utah Public Service Commission ("Commission") holding that the Commission has no authority to regulate one-way mobile telephone paging services. Petitioners allege, *inter alia*, that the Commission did not follow proper administrative procedures in concluding that it lacked jurisdiction We agree that the Commission failed to adhere to proper requirements in ruling on the jurisdictional issue, and accordingly reverse and remand for a

new hearing that comports with the applicable statutes.

Understanding the history of the Commission's assertion of regulatory authority over one-way paging services is important to this case. In 1962, the Commission granted a certificate of public convenience and necessity to operate both a two-way mobile telephone system and a one-way paging service to petitioner Mobile Telephone, Inc. By this action, and without objection from any party, the Commission assumed jurisdiction over both one-way paging and two-way mobile telephone services under sections 54-2-1(21), (22), and (30) of the Code.[1] Between 1962 and 1983 the Commission granted similar dual authority certificates to three other companies. In 1974, the Commission granted to Mobile Telephone of Southern Utah, Inc., a single authority certificate covering only one-way paging service. From the record, it appears that the Commission has, on occasion, denied requests for certificates for one-way paging authority. Until 1983, however, the Commission's authority to regulate one-way paging services was not questioned.

In the early 1980's, the Federal Communications Commission deregulated radio frequencies for use in paging services. Sixty-nine channels were made available in Utah on a first-come, first-served basis.[2] Page America, Inc., American Paging, Inc., and United Paging Corporation each received a permit from the Federal Communications Commission to operate on one of the new frequencies early in 1983.[3] In May of 1983, American Paging's attorney contacted Commissioner Irvine to inquire whether American Paging could operate a one-way paging system without a certificate. At the request of this attorney, Commissioner Irvine discussed the issue with the other commissioners. Thereafter, the Commission sent a letter to the attorney for American Paging, dated June 3, 1983, stating that in the Commission's opinion, no certificate was required. It added that the Commission would not request a hearing on the issue.[4] That letter is the basis of the controversy here.

In August of 1983, Page America applied for a certificate to operate a paging service; petitioner Industrial Communications protested the application. The Commission scheduled a public hearing on the application for December of 1983, indicating its desire to "review" its jurisdiction over one-way paging services. Page America later moved for a determination that it was exempt from regulation. The Commission scheduled a hearing on that motion for November 7th.

1. U.C.A., 1953, § 54-2-1(30) (Repl. Vol. 6A, 1974), states in part: "The term 'public utility' includes every ... telephone corporation ... where the service is performed for, or the commodity delivered to the public generally...." Subsection (22) states:

   > The term "telephone corporation" includes every corporation and person, their lessees, trustees and receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any telephone line for public service within this state.

   Subsection (21) states:

   > The term "telephone line" includes all conduits, ducts, poles, wires, cables, instruments and appliances, and all other real estate and fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate communication by telephone whether such communication is had with or without the use of transmission wires.

2. *See* 47 C.F.R. 22.501(a)(1) and (4), (d) and (p)(1) (1983).

3. After receiving its permit from the FCC, United Paging Corporation applied to the Commission for a certificate of convenience and necessity, which application was pending at the time of the Commission's hearing now under review. United Paging did not take part in that hearing and its present status is not apparent from the record.

4. The letter read in pertinent part:

   > Inasmuch as American Paging of Utah is proposing to offer only one-way paging service, rather than telephone service as defined in the Utah Code, it does not appear necessary for your client to file an application for a certificate of public convenience and necessity. As a matter of policy the Commission does not construe its jurisdiction on an informal basis, but deems the statute sufficiently clear on its fact that it would not, on its own motion, require a hearing with respect to your proposed operation.

Meanwhile, American Paging had begun operations without a certificate in reliance on the Commission's June letter declining to exercise jurisdiction. Industrial Communications therefore asked the Commission to issue a cease and desist order to stop American Paging from operating without a certificate. A hearing on the cease and desist request was held October 24, 1983. At that hearing, the Commission admitted it was in a dilemma inasmuch as it had "contradicted itself somewhat by the issuance of the June 3rd, 1983 letter." The Commission refused to order American Paging to stop operations; however, it ordered American Paging not to accept new customers until after the November hearing on Page America's certificate at which the jurisdictional issue would be reviewed.

Following the November hearing, the Commission formally ruled that it had no jurisdiction to regulate one-way paging services, effectively deregulating that field. The Commission dismissed Page America's application for a certificate and cancelled the certificates of Industrial Communications and Mobile Telephone, Inc., to the extent they authorized one-way paging services. It also cancelled the certificate granted to Mobile Telephone of Southern Utah, Inc., authorizing the operation of a one-way paging system.[5]

After the ruling, Industrial Communications, which had opposed deregulation, sought a reversal of the Commission's order and a disclosure of *ex parte* communications relating to the jurisdictional issue. It also moved for a rehearing before a commission *pro tempore*, claiming that by virtue of the June letter to American Paging, the Commission had prejudged the jurisdictional issues.[6] The Commission acknowledged the June letter and the contacts leading up to it, but refused to set aside its order for any reason. On appeal, Industrial Communications and Mobile Telephone, Inc., challenge the Commission's actions.

The principal procedural point raised by petitioners is that the Commission's June letter effectively operated to relinquish the Commission's jurisdiction over one-way paging, and stripped petitioners and their similarly situated competitors of a valuable property right—their certificates. Petitioners argue that under the provisions of the Utah Administrative Rule Making Act, the hearing provisions of the Public Service Commission Act, and the due process clauses of state and federal constitutions, the June letter constituted a *de facto* rule making which required that all interested parties be given proper notice and an opportunity to be heard. *See* U.C.A., 1953, § 63–46–5 (2nd Repl. Vol. 7A, 1978); U.C.A., 1953, § 54–7–13 (Repl. Vol. 6A, 1974); Utah Const. art. I, § 7; and U.S. Const. amend. XIV.

[1] We first inquire whether the Commission's actions complied with the procedural requirements of the statutes governing agency rule making or agency adjudication. Any state agency promulgating a rule must follow the procedures specified in that act. U.C.A., 1953, § 63–46–1 (2nd Repl. Vol. 7A, 1978).[7] A rule is defined as a "statement of general applicability ... that implements or interprets the law or prescribes the policy of the agency in the administration of its functions...." U.C.A., 1953, § 63–46–3(4) (2nd Repl. Vol.

5. Two companies not participating in the hearing still hold certificates of convenience and necessity for one way paging services.

6. Section 54–1–1.6 of the Code, enacted in 1983 (1983 Utah Laws ch 246, § 5), provides for a commissioner *pro tempore* to be appointed by the governor when a commissioner is "temporarily dismissed or disqualified." Commissioners *pro tem* shall have the qualifications required for public service commissioners.

7. The Utah Rule Making Act was repealed and replaced in its entirety after the facts giving rise to this action occurred. Our conclusion would not be any different were we to analyze this case under the new statute. 1985 Utah Laws ch 158, § 2. The statute now requires rule making whenever "agency actions affect a class of persons" and defines a rule as "a statement made by an agency that applies to a general class of persons [which] implements or interprets policy made by statute." U.C.A., 1953, § 63–46a–3(3)(a), –2(8) (2nd Repl. Vol. 7A, 1978 and Supp. 1985).

7A, 1978). The Public Utilities Act, also relied on by petitioners, requires that the Commission give notice and hold a hearing before it alters, amends, or rescinds an order or decision. U.C.A., 1953, § 54-7-13 (Repl. Vol. 6A, 1974). Petitioners claim that the procedural requirements of at least one of these statutes apply here because the June letter constituted either a "rule" within the meaning of the Rule Making Act, or an "order" within the meaning of the Public Utilities Act.

The Commission argues that the June, 1983, letter was not a rule making within the meaning of the Utah Rule Making Act because it did not have general applicability. The Commission also argues that because it had never formally determined that it had jurisdiction to regulate paging services under the Public Utilities Act, it was free to announce its opinion on the subject without any procedural formalities. There is no merit to the Commission's arguments.

As an initial matter, we note that the Utah Administrative Rule Making Act seems most directly on point here. It deals in some specificity with matters that the Public Utilities Act covers only inferentially, and the Rule Making Act's provisions do not appear inconsistent with the earlier enacted utility statute.

The pivotal question is whether the decision announced by the Commission in the June letter amounted to a rule. It might be argued that the Commission's action here is merely legitimate law development through adjudication as opposed to rule making. We acknowledge that there is a variance of opinion on when an agency is engaged in rule making and must follow formal rule making procedures, and when an agency may legitimately proceed by way of adjudication. *See, e.g., NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969); and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974). However, we think that there are some fundamental points of reference in this area of the law that are of assistance in determining whether the Commission should have proceeded by formal rule making. Professor Davis summarized some of these considerations.

> Although a retroactive clarification of uncertain law may be brought about through adjudication, according to [*SEC v. Cheney Corp.*, 332 U.S. 194 [67 S.Ct. 1575, 91 L.Ed. 1995 (1947)] and its many progency ..., the problem may be different when an agency through adjudication makes a change in clear law, as when it overrules a batch of its own decisions, especially if private parties have acted in reliance on the overruled decisions.

2 K. Davis, *Administrative Law Treatise* § 7:25, at 122 (2d ed. 1978). Interpreting the definition of "rule" contained in section 63-46-3(4), in light of these considerations, leads us to the conclusion that the Commission was engaged in rule making and had to follow the requirements of the Utah Administrative Rule Making Act.[8]

First, the Commission's decision was generally applicable: by deregulating the one-way paging market and permitting open competition in the market, the decision altered the rights of all certificate holders, despite their explicit reliance on the Commission's prior interpretation. Second, the letter interpreted the scope of the Commission's statutory regulatory powers, thus "interpret[ing] the law," within the meaning of the Rule Making Act. Moreover, in so acting the Commission, in the words of Professor Davis, made a "change in clear law." For over twenty years, the Commission has interpreted its authority over telephone corporations to include one-way paging services. It has required certificate holders to file tariffs and pay public utility sales taxes. It has denied some requests for certificates. In one case, it issued a certificate that covered only one-way paging. In *Medic-Call, Inc. v. Public Service Commission*, 24 Utah 2d 273, 470 P.2d 258 (1970), the Commission even went

8. For these reasons, section 54-7-1.5, governing the functions of the Commission when entering an order, has no application to the June letter or the proceedings leading up to its issuance

to court to defend its jurisdiction over paging services.[9]

Under all these circumstances, we conclude that the Commission cannot reverse its long-settled position regarding the scope of its jurisdiction and announce a fundamental policy change without following the requirements of the Utah Administrative Rule Making Act. *See, e.g., Ford Motor Co. v. FTC,* 673 F.2d 1008 (9th Cir.1981), *cert. denied,* 459 U.S. 999, 103 S.Ct. 358, 74 L.Ed.2d 394 (1982); *see also* 2 K. Davis, *Administrative Law Treatise* § 7:25, at 125 (2d ed.1978). These requirements were not met. Nonparties were not given notice of the Commission's intention to reconsider its long-held position in connection with the June letter. And the November adjudicative hearing certainly cannot be considered an adequate substitute for a rule making proceeding. Many of the protections provided for by the Act were missing from that proceeding, including adequate advance notices to all affected parties, an opportunity to participate, and an opportunity to comment on the proposed rule. U.C.A., 1953, § 63–46a–4 (2d Repl. Vol. 7A, 1978, Supp.1985). Because the requirements of the Act were not satisfied, the rule is vacated and the matter is remanded for further proceedings.

[2] The next issue is whether the current commissioners should be precluded from considering the jurisdictional matter on remand. Petitioners contend that the commissioners who participated in the decision announced in the June letter had prejudged the jurisdictional issue. Therefore, they request that we order the recusal of all the commissioners and the appointment of a commission *pro tempore.*

Petitioners assert that recusal is necessary because the opinion announced in the June letter violated the statutory prohibitions against *ex parte* communication about matters pending before the Commission. Section 54–7–1.5 provides in part:

> No member of the public service commission ... shall make or knowingly cause to be made to any party any communication relevant to the merits of any matter under adjudication unless notice and an opportunity to be heard are afforded to all parties. No party shall make or knowingly cause to be made to any member of the commission ... an ex parte communication relevant to the merits of any matter under adjudication.

There are several problems with petitioners' argument. By its terms the statute does not apply to dealings between the Commission and American Paging. In May and June of 1983, American Paging was not a party to any proceeding pending before the Commission that involved the question of the Commission's jurisdiction over one-way paging services. Moreover, the letter was not an adjudication but, in substance, a rule making, as we have noted above. Therefore, any dealings between American Paging and the commissioners could not be a communication between a "party" and a member of the Commission "relevant to the merits" of "any matter under adjudication." Second, section 54–7–1.5 was not effective until July 1, 1983, almost a month after the letter was written. *See* 1983 Utah Laws ch. 246, § 15.

It is true that the later proceedings before the Commission on the application of Page America for a certificate should be classified as an "adjudication" within the meaning of section 54–7–1.5, and that these proceedings occurred after the effective date of the statute. However, that does not change the nature of the May and June communications between the Commission and American Paging nor the fact that the statute, by its terms, does not apply to them.

Because the jurisdictional issue likely will be resolved by a rule making proceeding on remand and will obviate the need for further proceedings, we need not further

9. This Court ruled in *Medic Call* that the PSC could have no jurisdiction over a private nonprofit paging service because it was not a *public* utility. We did not reach the issue of whether a publicly available paging service, such as petitioners here operate, would be a public utility because our holding was limited to the private nature of the arrangements before us

consider whether and under what circumstances recusal may be required in administrative adjudications when the specific provisions of section 54-7-1.5 do not apply. Plainly, having participated in a rule making proceeding does not automatically preclude a commissioner from participating in a later, properly conducted adjudication.

We have considered the other issues raised and find their disposition unnecessary to the result. The Commission's rule is of no force and effect, and its order is vacated. The matter is remanded for proceedings consistent with this opinion.

HALL, C.J., and STEWART, HOWE and DURHAM, JJ., concur.

Jose Antonio LOPEZ, Plaintiff and Appellant,

v.

Fred C. SCHWENDIMAN, Chief, Driver License Services, Utah Department of Public Safety, Defendant and Respondent.

No. 20112.

Supreme Court of Utah.

June 12, 1986.

Utah State Driver License Division revoked driving privileges of driver for period of one year. The Seventh District Court, Carbon County, Richard C. Davidson, J., affirmed the administrative decision. Driver appealed. The Supreme Court, held that: (1) statute providing for arrest of one "in actual physical control" of vehicle while under the influence of alcohol and/or drugs was intended by legislature to protect public safety and apprehend drunken driver before he or she strikes and may not be construed to exclude those whose vehicles are presently immobile because of mechanical trouble, and (2) driver's refusal to submit to breath test upon rumors that there had been incidents of tampering with breathalyzer in the past was nevertheless refusal, subjecting defendant to license revocation.

Affirmed.

1. Automobiles ⇐144.2(9)

In revocation proceeding, Driver Division has burden to show that operator of vehicle was in actual physical control of motor vehicle and that arresting officer had grounds to believe that operator was under influence of alcohol.

2. Automobiles ⇐144.2(10)

In trial de novo, district court must determine by preponderance of evidence whether driver's license was subject to revocation for driving under the influence of alcohol. U.C.A.1953, 41-6-44.10.

3. Automobiles ⇐144.2(3)

Supreme Court's review of district court's determination as to whether driver's license was subject to revocation for driving while under the influence of alcohol is deferential to trial court's view of evidence unless trial court has misapplied principles of law or its findings are clearly against weight of evidence.

4. Automobiles ⇐144.1(1)

Even if truck was inoperable at time that licensee was found sleeping in it and arrested, that would not preclude him from having "actual physical control" over truck so that his driver's license could be revoked if he had statutorily prohibited blood alcohol content. U.C.A.1953, 41-6-44.10(1, 2).

5. Automobiles ⇐349

Statute providing for arrest of one "in actual physical control" of vehicle while under the influence of alcohol and/or drugs was intended by legislature to protect public safety and apprehend drunken driver before he or she strikes and may not be construed to exclude those vehicles are presently immobile because of mechanical

APPENDIX B

State of Utah
Administrative Rule Analysis
Notice of Proposed Rule/Change

008304
AGENCY FILE NUMBER

Office of Administrative Rules
Ite Archives Building, State Capitol
Salt Lake City, Utah 84114
Telephone 533-4647

Department:
Agency: Public Service Commission of Utah
Address: 160 East 300 South, SLC, Utah

Contact Person: David L. Stott or Joe Dunlop
Telephone: 530-6716

SHORT TITLE OF RULE

Commission jurisdiction over one-way paging services

BRIEF SUMMARY OF RULE OR CHANGE AND REASON FOR IT

The Public Service Commission of Utah does not have jurisdiction over one-way paging services. The reason for the rule is that one-way paging service does not fall within the definition of a "telephone corporation" in that such service does not utilize a "telephone line".

ANTICIPATED COST IMPACT OF RULE — UCA 63-46a-4(3)(d)

No cost impact

TYPE OF NOTICE

PROPOSED RULE (NEW, AMEND OR REPEAL) ☐ 120-DAY RULE — UCA 63-46a-7

CHANGE IN PROPOSED RULE (CHANGES PROPOSED RULE NUMBER _____) ☐ FIVE-YEAR REVIEW/CONTINUATION

JUSTIFICATION FOR 120-DAY RULE CHECKED ABOVE

☐ RULE AUTHORIZED BY STATE CODE (CITATION): 54-4-1 & Supreme Court Case No. 19967
☐ RULE REQUIRED BY FEDERAL MANDATE (U.S. CODE OR FED. REGISTER CITATION):

PUBLIC MAY PARTICIPATE IN RULEMAKING BY:

PUBLIC HEARING ☐ APPEARANCE AT ☒ WRITTEN COMMENT

ATE: TIME: AGENCY UNTIL: UNTIL: May 15, 1986

ACE:

NOTE: PUBLIC MAY REQUEST HEARING IN ACCORDANCE WITH UCA 63-46a-5(1)(b)

HE FULL TEXT OF ALL PROPOSED ADMINISTRATIVE RULES OR RULE CHANGES IS PUBLISHED IN THE **UTAH STATE BULLETIN** UNLESS XCLUDED BECAUSE OF LENGTH AND SPACE LIMITATION. THE FULL TEXT MAY BE INSPECTED AT THE AGENCY (ADDRESS ABOVE) OR FFICE OF ADMINISTRATIVE RULES.

AUTHORIZATION

IGNATURE OF AGENCY HEAD OR DESIGNEE

March 13, 1986
DATE

Brent H. Cameron, Chairman
AME (TYPED)

PSC of Utah
AGENCY

9. OFFICE OF ADMINISTRATIVE RULES
RECEIVED BY: William S. Callaghan
DATE: 3-25-86 TIME: 2:00 p.m.
120-DAY RULE EFFECTIVE: NA
120-DAY RULE LAPSES: NA

BRENT H. CAMERON
JAMES M. BYRNE
BRIAN T. STEWART

MEMORANDUM

TO: Brent H. Cameron
James M. Byrne
Ted Stewart

FROM: Joe Dunlop

DATE: May 16, 1986

RE: RULE ON ONE-WAY PAGING SERVICES, Case No. 86-999-06

I recommend adoption of the one-way paging rule effective today.

APPENDIX C

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of AMERICAN PAGING, INC. (OF UTAH) for a Certificate of Convenience and Necessity to Operate as a Public Utility Rendering Paging Service to the General Public in Areas of Box Elder, Weber, Morgan, Davis, Salt Lake, Utah, Summit, Wasatch) and Tooele Counties, Utah.	CASE NO. 85-2007-01 ORDER GRANTING MOTION TO DISMISS

ISSUED: May 23, 1986

By the Commission:

On or about August 10, 1983, Page America Inc. filed an application with the Commission to provide one-way paging service. On November 28, 1983, however, the Commission ruled that it had no statutory jurisdiction over paging services. The case was subsequently appealed to the Utah Supreme Court.

On or about April 30, 1985 American Paging Inc. (American Paging) filed an application with the Commission to provide one-way paging service to the general public between points in Box Elder, Weber, Morgan, Davis, Salt Lake, Utah, Summit, Wasatch and Tooele Counties within that area. American Paging filed simultaneously a Motion to Dismiss its Application for the reason that the Commission, in its Order of November 28, 1983, had determined that it did not have jurisdiction to regulate one-way paging services. American Paging also stated that although the 1985 Utah Legislature amended the Public Utilities Act by adding Chapter 8b. empowering the Commission to wholly or partially exempt certain competitive telecommunication services or service

providers, said chapter did not expand the Commission's jurisdiction beyond that which it already had.

On or about March 4, 1986, the Utah Supreme Court ruled that the Commission's deregulation of one-way paging was defective because the Commission had attempted the deregulation through an Order construing its jurisdiction rather than through rulemaking under the Administrative Rulemaking Act.

Thereafter, in accord with the instruction of the Supreme Court, the Commission filed a notice of proposed rulemaking with the Office of Administrative Rules on April 15, 1986, which stated that the Commission did not have jurisdiction over one-way paging and the reasons for it. Notice was provided to the parties. No party requested a hearing within the 15-day period following publication as required by the Utah Administrative Rulemaking Act. The rule was formally adopted and made effective May 16, 1986.

The Commission further concludes from the comments and oral arguments of the parties that Chapter 8B of the Public Utilities Act of the Utah Code does not expand the jurisdiction of the Commission to include one-way paging.

Based upon the foregoing, the Commission will make the following:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That the Commission, having issued a rule pursuant to the Utah Administrative Rulemaking Act and in accord with the direction of the Utah

Supreme Court that it does not have jurisdiction over one-way paging services and having further determined that Chapter 8B of the Public Utilities Act does not expand the jurisdiction of the Commission to include one-way paging, hereby grants American Paging's Motion to Dismiss its Application for a Certificate of Convenience and Necessity to provide one-way paging services.

DATED at Salt Lake City, Utah, this 23rd day of May, 1986.

/s/ Brent H. Cameron, Chairman

(SEAL)

/s/ James M. Byrne, Commissioner

/s/ Brian T. Stewart, Commissioner

Attest:

/s/ Georgia B. Peterson, Secretary